UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: PINNACLE AIRLINES, INC.

FAA Order No. 2012-2

Docket No. CP09SO0002
FDMS No. FAA-2009-0180[1]

Served: May 22, 2012

DECISION AND ORDER[2]

I. Introduction

Respondent Pinnacle Airlines, Inc. (Pinnacle), a regional airline providing service for Northwest Airlines and Delta Airlines, has appealed[3] the written initial decision of Administrative Law Judge (ALJ) Isaac D. Benkin.[4] The ALJ assessed Pinnacle a $200,000 civil penalty for 19 violations of certain drug and alcohol testing regulations applicable to air carriers.

On appeal, Pinnacle is contesting one of the ALJ's findings of violations – *i.e.*, the finding that Pinnacle violated 14 C.F.R. § 121.457(a) and Part 121, Appendix I, § V.A.1 (2007) by hiring a mechanic before conducting a DOT pre-employment drug test and before receiving

[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at the following Internet address: *www.regulations.gov*.

[2] The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: *www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty*. In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

[3] Pinnacle has requested oral argument. This request is denied, as oral argument is not necessary for proper disposition of Pinnacle's appeal.

[4] A copy of the ALJ's decision is attached.

verified negative drug test results.

The remainder of Pinnacle's appeal involves the sanction. Specifically, Pinnacle argues that the civil penalty should be reduced from $200,000 to $54,000[5] for the following reasons:

- The ALJ erred in assessing a maximum civil penalty for violations that involved a low material risk of harm to the flying public.
- The ALJ erred in finding that Pinnacle's remedial efforts did not warrant a lower civil penalty.
- The ALJ erred in relying on information not in the record.
- The ALJ erred in holding that the maximum civil penalty for each violation was $25,000, because Complainant asserted in the complaint that it was seeking a civil penalty under 49 U.S.C. § 46301(a)(5), which, in conjunction with 14 C.F.R. § 13.305(d), authorizes a maximum civil penalty of only $11,000 per violation by a small business concern.

This decision affirms the civil penalty assessed by the ALJ.

II. Background

A. The DOT/FAA Anti-Drug and Alcohol Misuse Prevention Programs

The Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. §§ 45101-45107, requires drug and alcohol testing of safety-sensitive transportation employees in aviation and other transportation industries. Under the Act's authority, the Department of Transportation (DOT) promulgated regulations requiring pre-employment, random, and post-accident drug and alcohol tests for employees throughout the transportation industry. 49 C.F.R. Part 40. These regulations address who must conduct drug and alcohol tests, how to conduct those tests, and what procedures to use when testing.

In addition, the FAA promulgated drug and alcohol testing regulations specific to aviation. In 2007, the drug and alcohol testing regulations applicable to air carriers operating

[5] Pinnacle does not explain in its appeal brief the reasoning behind its selection of $54,000 as the amount to which the penalty should be reduced.

under Part 121 were found in Part 121 and Part 121, Appendices I (drug testing program) and J (alcohol misuse prevention program). Section 121.457[6] required each certificate holder or operator operating under Part 121 to test each of its employees who performed a safety-sensitive function for certain drugs in accordance with the standards forth in Part 121, Appendix I. Air carriers operating under Part 121 also were required to test employees performing safety-sensitive functions for alcohol misuse in accordance with the standards set forth in Appendix J under Section 121.459(b).[7]

Regarding pre-employment drug testing, Appendix I provided that no employer may *hire* any individual for a safety-sensitive function or *transfer* an employee from a nonsafety-sensitive to a safety-sensitive function unless the employer first conducted a pre-employment test and received a verified negative drug test result for that individual. 14 C.F.R. Part 121, Appendix I, §§ V.A.1[8] and V.A.2[9] (2007).

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[6] Section 121.457(a) provided, "Each certificate holder or operator shall test each of its employees who performs a function listed in appendix I to this part in accordance with that appendix." 14 C.F.R. § 121.457(a) (2007).

In 2009, the drug and alcohol testing regulations for Part 119 certificate holders were consolidated in a new 14 C.F.R. Part 120. 74 Fed. Reg. 22563 (May 14, 2009). The requirements of § 121.457(a) are now set forth in the Federal Aviation Regulations (FAR) at 14 C.F.R. § 120.35.

[7] Section 121.459(b) provided, "No certificate holder shall use any person who meets the definition of *covered employee* in appendix J to this part to perform a safety-sensitive function listed in that appendix unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J." 14 C.F.R. § 121.459(b) (2007). The requirements of this section are now set forth in 14 C.F.R. § 120.39.

[8] Appendix I, § V.A.1 provided, "No employer may hire any individual for a safety-sensitive function listed in section III of this appendix unless the employer first conducts a pre-employment test and receives a verified negative drug test result for that individual." This requirement now appears at 14 C.F.R. § 120.109(a)(1).

[9] Appendix I, § V.A.2 provided, "No employer may allow an individual to transfer from a nonsafety-sensitive to a safety-sensitive function unless the employer first conducts a pre-employment test and receives a verified negative drug test result for the individual." This requirement now appears at 14 C.F.R. § 120.109(a)(2).

Regarding both random drug and alcohol testing, Appendix I and Appendix J provided that an employer must use a random selection process in which "each covered employee shall have an equal chance of being tested each time selections are made." 14 C.F.R. Part 121, Appendix I, § V.B.5,[10] and Appendix J, § III.C.5 (2007).[11]

B. Allegations in this Case

The FAA conducted an inspection of Pinnacle's antidrug and alcohol misuse prevention programs in September 2007 to determine whether Pinnacle was in compliance with the pertinent regulations. FAA inspectors discovered discrepancies which formed the basis of this action.

Complainant filed a complaint alleging that Pinnacle had:

> (a) hired two employees for safety-sensitive positions (a mechanic and an aircraft dispatcher) before Pinnacle had received verified negative drug tests for the employees;
>
> (b) transferred sixteen employees into safety-sensitive positions (ground security coordinators) before Pinnacle had received verified negative pre-employment drug test results for the employees; and
>
> (c) failed to place one employee (an aircraft dispatcher) into random pools for both drug and alcohol testing.

Complainant alleged that Pinnacle violated 14 C.F.R. § 121.457(a) (2007); 14 C.F.R. Part 121, Appendix I, § V.A.1 (2007); 14 C.F.R. Part 121, Appendix I, § V.A.2 (2007); 14 C.F.R. Part 121, Appendix I, § V.B.5 (2007); and 14 C.F.R. Part 121, Appendix J, § III.C.5 (2007).

Complainant sought a $200,000 civil penalty, asserting that Pinnacle was subject to a

[10] Section § V.B.5 of Appendix I provided in pertinent part, "Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made." This standard currently appears at 14 C.F.R. § 102.109(b)(5).

[11] Section § III.C.5 of Appendix J provided in pertinent part, "Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made." This standard currently appears at 14 C.F.R. § 120.217(c)(5).

civil penalty of up to $25,000 for each violation. The FAA has the authority to assess a civil penalty of up to $25,000 per violation against a person (other than an individual or small business concern) under 49 U.S.C. § 46301(a)(1); however, in its complaint, instead of referencing 49 U.S.C. § 46301(a)(1), Complainant cited Section 46301(a)(5), [12] which in conjunction with the inflation-adjustment regulation, 14 C.F.R. § 13.305(d), authorized the FAA to assess a civil penalty of up to $11,000 per alleged violation against an individual or small business concern.

Although Pinnacle denied that it had committed these violations in its Answer, at the hearing Pinnacle only contested the alleged violations regarding the failure to receive the verified negative pre-employment drug test results of two employees. Pinnacle's attorney conceded that the other violations had occurred, as alleged. (Exhibit A-1, Stipulation of Facts dated August 19, 2009.)

III. The Initial Decision

The ALJ held that 19 violations occurred, as alleged in the complaint, and rejected Pinnacle's arguments that the $200,000 civil penalty sought by Complainant was too high.

The ALJ rejected Pinnacle's arguments concerning sanction mitigation. Pinnacle had argued that its employees were subjected to the company's *non-DOT* pre-employment drug testing prior to hiring for, or transferring to, a safety-sensitive function, and therefore, the violations regarding *DOT* pre-employment testing were only technical in nature. The ALJ found that the evidence was insufficient to prove that Pinnacle's testing program was adequate under the regulations, and further "the notion that a carrier's failure to comply with a regulation

[12] 49 U.S.C. § 46301(a)(5)(A) provides that "[a]n individual (except an airman serving as an airman) or small business concern is liable to the Government for a civil penalty of not more than $10,000" for violations of listed statutory provisions or regulations issued under those provisions.

because it was doing something else 'just as good' is anathema to the rule of law in a regulated industry." (Initial Decision at 5.) He concluded that Pinnacle's use of its own drug testing program for the employees involved in this case was entitled to little weight in assessing the civil penalty. (Initial Decision at 6.)

Pinnacle also argued that it had sent the employees in question for training before they performed any safety-sensitive functions and it received verified negative test results before any of these employees were assigned to safety-sensitive duties. However, as the ALJ noted in his decision, the Administrator specifically decided that testing and the receipt of negative test results must precede the date of hiring, as opposed to the date on which job performance begins.[13] Hence, he was not persuaded by this argument regarding training after the date of hire.

The ALJ also rejected the argument that the violations were inadvertent, writing as follows:

> If it [Pinnacle] had taken such precautions and one or two transferred employees had "slipped through the cracks" and had begun training a day or so before the negative test result was received, we might perhaps have a basis for considering the carrier to have committed one or two "inadvertent" violations. But we simply cannot reach that conclusion, either as a matter of logic or regulatory discretion, when the selfsame violation turns up sixteen times.

(Initial Decision at 10.)

The ALJ acknowledged that corrective actions may at times be mitigating, but he rejected Pinnacle's arguments that it had taken corrective actions that warranted a lower civil penalty. Pinnacle had introduced evidence that it had replaced its computer program for tracking compliance with the testing requirements, had introduced a system of auditing compliance, had

[13] 14 C.F.R. Part 121, Appendix I, § V.A.1 (2007) (emphasis added) provided: "No employer may *hire* any individual for a safety-sensitive function … unless the employer first conducts a pre-employment test and receives a verified negative drug test result for that individual."

introduced a new computer-based training program for managers, etc. The ALJ found that Pinnacle had not carried its burden of proving that its corrective actions were sufficient, specific or swift as required in the case law. (Initial Decision at 11-12.)[14]

The ALJ rejected Pinnacle's argument in its post-hearing brief that it should be treated as a small business concern to which a lower maximum civil penalty is authorized under the Federal aviation statute, because there was no evidence that Pinnacle is a small business. He wrote that a $25,000 civil penalty per count is applicable to Pinnacle under 49 U.S.C. § 46301(a)(5)(A). (Initial Decision at 16.)

The ALJ found that Pinnacle's violation history, consisting of five civil penalties ranging from $5,000 to $27,000 between 1997 and 2006, for violations of testing regulations, constituted an aggravating factor. He found that the past civil penalties had not been high enough to induce Pinnacle to comply with the regulations and he "hope[d] that, upon collection of a $200,000 civil penalty, the FAA will have finally gotten this carrier's attention." (Initial Decision at 17.)

IV. Pinnacle's Arguments on Appeal

Each of Pinnacle's arguments for reducing the $200,000 civil penalty is discussed below.

A. Allegedly Incorrect Hire Date

Mechanic Stewart filled out an application with Pinnacle and went to take his drug test on September 29, 2006. (Tr. 220.) At some point during or after the inspection of Pinnacle in September 2007, Pinnacle provided Complainant with an "Employee Action Notice" indicating that on September 29, 2006, Pinnacle hired Stewart to perform maintenance or preventive maintenance as an A&P [Airframe & Powerplant] mechanic. (Exhibit A-3; Tr. 99.) Stewart and a Pinnacle manager had each signed the notice. In addition, there was testimony at the hearing

[14] The ALJ rejected Pinnacle's other arguments in mitigation as well but, due to the nature of the appeal, there is no need to discuss those aspects of the initial decision.

that the hire date for Stewart entered in Pinnacle's computer system was September 29, 2006. (Tr. 221.) Pinnacle received Stewart's verified negative DOT drug test results for Stewart on September 30, 2006. (Ex. A-13; Tr. 221.) Hence, Complainant concluded, Pinnacle violated the regulations in that it did not receive the verified negative drug test result until the day after Stewart was hired.

Pinnacle argues, however, that there was no violation because September 29, 2006, was not the correct hire date. Pinnacle's Vice President of People, Mary Ann Morrow, testified that the hire date for Stewart was actually October 16, 2006, the day he started work. (Tr. 222.) Ms. Morrow testified that September 29, 2006, should not have been the hire date entered in the system because Pinnacle would not have put someone to work the same day that the person filled out his or her application and was interviewed. (Tr. 221.) According to Ms. Morrow, an error must have been made by the Human Resources clerk, who picked up the date from the application. (*Id*.) According to Pinnacle, "[u]nder Pinnacle's policies at the time, it [was] highly improbable that Stewart was extended an offer of employment on the same day he filled out his application, because any offer of employment would have been conditional upon his passing a criminal background check and DOT drug test." (Appeal Brief at 7.)

The ALJ indicated that Ms. Morrow was not persuasive because she had no personal knowledge of when Stewart was hired. Nor did she provide any documentation to show that Pinnacle's records were in error. The ALJ pointed out that Pinnacle did not call to testify at the hearing either Stewart, the manager, or the human resources clerk who purportedly made the mistake, even though all these individuals were under Pinnacle's control. (Initial Decision at 4.)

The ALJ correctly resolved this issue. Pinnacle's policy may have been to receive verified negative drug tests before hiring or transferring employees, but there is no evidence that

it followed that policy. The hire date, as indicated on the Notice of Employment, which was signed by both Stewart and a Pinnacle manager, shows that there was not merely a computer data entry error. Hence, there is no reason to reverse the ALJ's finding of a violation involving Stewart.

Pinnacle argues that if a violation is found, then only a minimum civil penalty should be assessed because Pinnacle received the negative drug result weeks before Stewart started work, and therefore, any violation was no more than a "mere paperwork" violation. Pinnacle cites no authority indicating that a violation is less egregious if the employee did not yet start work.

B. Statutory Authority for Civil Penalty

Pinnacle argues on appeal that the ALJ erred in assessing a civil penalty under a statute that Complainant did not assert in the complaint. Complainant alleged in the complaint that Pinnacle was subject to a civil penalty for its violations under 49 U.S.C. § 46301(a)(5), which Complainant alleged authorized a civil penalty not exceeding $25,000 per violation. However, Section 46301(a)(5), in conjunction with the inflation-adjustment provision in 14 C.F.R. § 13.305(d), authorizes an assessment of up to $11,000 for violations of listed statutory provisions against an individual or small business concern. Section 46301(a)(5) is not applicable to large air carriers. The ALJ was mistaken in writing that Section 46301(a)(5) was the authority for assessing Pinnacle a civil penalty of up to $25,000 per violation.

Complainant's position is that Pinnacle is a large air carrier, not a small business concern. (Reply Brief at 29.) Complainant explained that it actually intended to cite 49 U.S.C. § 46301(a)(1),[15] which authorizes an assessment of up to $25,000 against a person, including a

[15] In pertinent part, 49 U.S.C. § 46301(a)(1) provides: "A person is liable to the United States Government for a civil penalty of not more than $25,000 (or $1,100 if the person is an individual or small

large air carrier, for certain statutory and regulatory violations, or a maximum of $1,100 for an individual or a small business concern.[16]

The failure on the part of Complainant and the ALJ to cite the correct statutory provision as the authority for assessing $25,000 per violation was harmless error. The authority to assess a civil penalty of up to $25,000 per violation did exist in 49 U.S.C. § 46301(a)(1). Pinnacle was on notice that it was subject to a civil penalty of up to $25,000 per violation, because although Complainant had cited the wrong statutory provision in the Complaint, it had stated correctly the extent of its authority to assess a civil penalty against Pinnacle.

C. Non-DOT Drug Testing Program

Pinnacle admits that it violated the regulations by transferring 16 of its employees from

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business concern for violating" certain statutory provisions of the Federal aviation act and regulations issued thereunder. "

[16] Pinnacle also argues that Complainant failed to show that it was a large air carrier that would be subject to a $25,000 civil penalty per violation. Actually, small business status was an affirmative defense that Pinnacle had the burden of proving. 14 C.F.R. § 13.224(c) (party who has asserted affirmative defense has the burden of proving it). Pinnacle did not assert that it was a small business, let alone prove it.

For the definition of small business concern, *see* 15 U.S.C. § 632. The maximum number of employees for a small business concern in scheduled air passenger transportation is 1500. 13 C.F.R. § 121.201 (specifically, Subsector 481, Air Transportation; 48111 Scheduled Air Passenger Transportation).

The record does not contain evidence regarding how many employees Pinnacle had in 2007, when the inspection was conducted. However, statements made by Pinnacle's attorney at the hearing, although not evidence, appear to indicate that Pinnacle was not a small business concern in 2007. Pinnacle's attorney stated in his opening statement that Pinnacle had 1000 ground handlers scattered in 30 cities. (Tr. 80.) He stated that Pinnacle has 30 information technology (IT) employees. (Tr. 87.) Also, Pinnacle's publicly filed 2007 Annual Report, p. 11, available on the Internet but not included in the record of this case, states that as of December 31, 2007, Pinnacle Airlines, Inc. had 4,008 employees. The final report is part of Pinnacle's Form 10-K filed with the U.S. Securities and Exchange Commission. *See* http://media.corporate-ir.net/media_files/irol/13/131072/PNCL_2007_AR_new.pdf. *See also* Exhibit R-2 (Pinnacle's Form 10-Q) at 7, stating that "[On] June 30, 2009, Pinnacle operated 124 Canadair Regional Jet (CRJ) -200 under Delta brands with approximately 695 daily departures to 116 cities in 34 states, the District of Columbia, and four Canadian provinces. Pinnacle also operated a fleet of 16 CRJ-900 aircraft as a Delta Connection carrier with approximately 91 daily departures to 34 cities in 17 states, the District of Columbia, Belize, Mexico, Turks and Caicos Islands and the U.S. Virgin Islands."

nonsafety-sensitive positions to safety-sensitive ground security coordinator (GSC) positions before it had received negative DOT drug test results concerning the employees. But Pinnacle argues that there was a low material risk to the flying public from these violations because all 16 of the GSCs were tested in Pinnacle's non-DOT drug testing program and had received negative results, and therefore, a lower civil penalty per violation was appropriate.

Actually, only 15 of the 16 GSCs were subject to non-DOT pre-employment drug tests. (Tr. 195.) Even if they all had been subject to it, the ALJ correctly gave little weight to this argument. There was inadequate proof to support Pinnacle's claim that its program "mimed" the DOT program. For example, there was testimony that for non-DOT tests, unlike for DOT tests, the testers do not take anti-tampering measures such as blueing the water in the restroom and requiring the employee to remove his or her outer garments before entering the restroom. (Tr. 548.) Further, although Pinnacle claimed that its contracts – with collectors, the laboratory, the third party administrator, and Medical Review Officers (MROs) – provided for following DOT requirements, Pinnacle failed to introduce the contracts into the record. Also, there was testimony on cross-examination from Pinnacle's Vice President of People, Mary Ann Morrow, that Pinnacle does not audit its laboratories to determine whether they are following DOT requirements for non-DOT tests. (Tr. 406, 409.)

In any event, some of the non-DOT pre-employment drug tests occurred more than 180 days before the employee was transferred. Consequently, even if Pinnacle's non-DOT pre-employment drug testing was equivalent to a DOT pre-employment drug test, the non-DOT drug tests were too old because pre-employment tests are valid under DOT regulations for only

180 days. 14 C.F.R. Part 121, Appendix I, § V.A.3 (2007); *see, e.g.*, Tr. 195, 386.[17]

For these reasons, the ALJ did not err in declining to reduce the civil penalty based on Pinnacle's non-DOT drug testing program.

D. <u>Results Received Before Training</u>

Pinnacle admits that it hired Dispatcher Jeremy Heinbach before receiving his negative DOT drug test results. Specifically, Pinnacle admits that it hired Heinbach on July 30, 2007 and received Heinbach's verified negative DOT drug test results on August 2, 2007 (Exhibit R-11), and that Heinbach began company indoctrination training on August 14, 2007. However, Pinnacle states that there was a low risk from this violation to the flying public because Heinbach did not begin training until approximately 2 weeks after Pinnacle received his verified negative DOT pre-employment drug test results. Therefore, according to Pinnacle, the civil penalty for this violation should be reduced.

According to the regulations, no employer may *hire* any individual for a safety-sensitive function unless the employer first receives a verified negative drug test result for that individual. 14 C.F.R. Part 121, Appendix I, § V.A (2007). The date of *hire* is what is relevant, not the date of training. (Exhibit A-6 at 1.)[18]

Further, contrary to Pinnacle's assertion in its brief, the ALJ did not assess a maximum

[17] For example, Pinnacle employee Brenda Sweat had a non-DOT drug test on July 24, 2006. (Tr. 382.) A negative result was reported on July 25, 2006. (*Id.*) Sweat began GSC training on June 29, 2007, about 11 months after the non-DOT drug test. (Tr. 385; Exhibit R-16.)

[18] Exhibit A-6 is a letter from Rebecca B. MacPherson, FAA Assistant Chief Counsel, Regulations Division, to Deborah McElroy, President, Regional Airline Association, May 31, 2005, advising that "pre-employment testing must be conducted and a negative drug test result received before an individual is *hired* for a safety sensitive function or transferred from a non-safety-sensitive function to a safety-sensitive function." (Emphasis in the original.)

civil penalty for the violation involving Heinbach.[19] The ALJ assessed a $200,000 civil penalty for 19 violations, which, on average, amounts to less than $11,000 per violation. The maximum civil penalty per violation, as discussed above on p. 5, was $25,000. Such a civil penalty reflects not only the gravity of the violation, but as will be discussed further, the aggravating factors in this case.

E. Random Drug and Alcohol Testing Pools

Pinnacle admits that it failed to place Dispatcher Michael Sampson into the random drug and alcohol testing pools, due to what Pinnacle states was an inadvertent computer error. However, Pinnacle argues that its error posed a low material risk to the flying public because Sampson would not have known about the error and, consequently, the goal of deterrence was still met.

1. Alcohol Testing Pool

Regarding the failure to place Sampson into the random alcohol testing pool, Complainant only alleged in the Complaint that Pinnacle failed to comply with 14 C.F.R. Part 121, Appendix J, § III.C.5 (2007), which provided that:

> The selection of employees for random alcohol testing shall be made by a scientifically valid method, such as a random-number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made.

[19] Appendix 4 of the Compliance and Enforcement Order, FAA Order No. 2150.3A, which was in effect at the time, provided that the maximum civil penalty range for an air carrier was $7,500 to $10,000. Appendix 4 was modified by the Compliance/Enforcement Bulletin, No. 92-1, which was issued on Ja0nuary 16, 1992, and provided that the maximum range civil penalty for Part 121 air carriers was either $7,500 to $10,000 or $6,500 to $10,000, depending upon whether the Part 121 air carrier had an annual operating revenue of more or less than $100,000,000. However, these ranges, with the maximum civil penalty of up to $10,000, were obsolete because Congress amended the Federal aviation statute in 2003 to authorize the imposition of up to a $25,000 civil penalty per violation.

This provision alone is merely a specification for the random alcohol misuse testing protocol that must be reflected in the carrier's program. It cannot, in itself, provide a basis for the violation of a regulation. A violation for failure by a certificate holder to comply with this standard would require a showing that the certificate holder's program failed to include the type of selection process described in 14 C.F.R. Part 121, Appendix J, § III.C.5. The regulation that must be alleged as violated would be 14 C.F.R. § 121.459(b) (2007), which provided that:

> *No certificate holder shall use any person* who meets the definition of covered employee in appendix J to this part to perform a safety-sensitive function listed in that appendix *unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J.*

(Emphasis added.) However, Complainant failed to allege a violation of 14 C.F.R. § 121.459(b) in the Complaint. Hence, the ALJ's finding of a violation involving random alcohol misuse testing of Sampson is reversed.

Complainant intended to allege 20 violations in the complaint (FAA Reply Brief at 6), one of which involved the failure to include Sampson in its random alcohol testing pool. However, Complainant failed to allege a violation of Section 121.459(b). As a result of this failure, Complainant actually alleged only 19 violations. In his decision, the ALJ stated that he assessed a $200,000 civil penalty for 19 violations. This decision also finds that there were 19 violations.

2. Drug Testing Pool

Regarding the failure to place Sampson into a random drug testing pool, which was a violation of 14 C.F.R. § 121.457, Pinnacle's argument that the sanction was too high is not compelling. The violation was egregious because there was no opportunity to detect drugs during random testing. On three occasions over the course of 7 months, Sampson performed safety-sensitive functions as an aircraft dispatcher for Pinnacle without being included in the

random drug testing pool. A penalty that is less than half of the maximum $25,000 civil penalty per violation is appropriate, and reflects the gravity of this violation as well as the aggravating factors present in this case.

F. Remedial Actions

Pinnacle argues that the ALJ failed to take account of Pinnacle's remedial actions. The Administrator has held that "swift, comprehensive, and positive corrective action may warrant a reduction in an otherwise reasonable civil penalty." *Mole-Master Services Corporation*, FAA Order No. 2010-11 at 11 (November 22, 2011) (citing *Whitley*, FAA Order No. 2009-4 at 10 (January 14, 2009)).

Pinnacle asserts that it took the following remedial actions that it argues were mitigating:

> [R]etraining managers on drug and alcohol testing, redesigning the training resources available to those managers to make them more accessible (Tran. 248:21-249:8), implementing a two-tiered audit system for ensuring internal compliance (Tran. 247:2-248:10), establishing new procedures for ensuring safety-sensitive employees have received verified negative DOT drug test results prior to training (Tran. 252:1-253:4), and implementing a new Human Resources management system that allows for better tracking of employees' drug testing, hire, and training dates. (Tran. 219:12-15; 219:21-220:3.)

(Appeal Brief at 23.)

Although Pinnacle states that it retrained its managers regarding drug and alcohol testing, it cites to nothing in the record to support that claim. As for changing the manager training from a lecture format to an electronic format, that is hardly a substantial change. Although Pinnacle states that some of its employees like the new format, the change is not significant enough to merit any reduction in the civil penalty that was assessed.

Regarding Pinnacle's two-tiered audit system, whereby it now audits both its own compliance and that of its third-party contractor, self-monitoring is a change that Pinnacle should have realized it needed when its violations began years ago. As the ALJ stated, it is difficult to

know whether Pinnacle's actions represent a real change or an effort simply to pacify the FAA, to create "smoke and mirrors." (Initial Decision at 12.)

Regarding the new procedures for ensuring that safety-sensitive employees have received verified negative DOT drug test results before training, this involved simply checking to see that the class roster includes only individuals who have received negative drug tests and that only individuals on the roster are in the class. (Tr. 252-253.) It is unclear why Pinnacle was not doing these simple things from the start. They do not warrant a reduction in the civil penalty. But more importantly, the primary issue in this case is not whether negative drug test results were in hand before training commenced, but rather whether individuals were hired or transferred before the receipt of test results.

Finally, regarding Pinnacle's implementation of a new Human Resources computer system, which Pinnacle states was intended to allow better tracking of employees' drug testing, hiring, and training dates, the ALJ stated that it was a relatively easy step. He questioned why an airline of Pinnacle's size and resources would continue to depend on a computer program that its own staff described as old and antiquated. He further stated that acquisition of new software would not correct the problem without a change in Pinnacle's *laissez-faire* approach to pre-employment drug testing. (Initial Decision at 12.) Whether this was a relatively easy step, as the ALJ found, cannot be determined on this record. However, as the ALJ found, Pinnacle's replacement of an old and antiquated system does not justify a reduction of the civil penalty assessed in this case because Pinnacle should not have been using an inadequate system to monitor compliance with the FAA's drug and alcohol testing regulations. The burden of persuasion was on Pinnacle, and it failed to introduce evidence that warranted mitigation.

G. Prior Violations

Pinnacle argues that the ALJ relied on inadequate evidence of prior violations and therefore the sanction of $200,000 is excessive.

At the hearing, Complainant called Amy Frankel, FAA Field Operations Branch Manager, to introduce the following report summaries from the FAA's Enforcement Information System (EIS), which is "an automated management information system that tracks the FAA's enforcement actions on a nationwide basis." (FAA Order 2150.3B, 9-1(2)(a).) The EIS "is the FAA's primary database for tracking information about enforcement actions for statutory or regulatory violations." (*Id.*)

Ms. Frankel personally reviewed Complainant's computer records containing information about Pinnacle's violation history, and she found the following entries:

1. ORD [ORDER] ASSESSING CP [CIVIL PENALTY] $5,000 (2000) (Exhibit. A-8.)
2. ORD ASSESSING CP $11,000 (2000) (Exhibit A-9.)
3. CIVIL PENALTY $27,000 (2005) (Exhibit A-10.)
4. ORD ASSESSING CP $10,000 (2006) (Exhibit A-11.)
5. ORD ASSESSING CP $10,000 (2007) (Exhibit A-12.)

The documentation showed that these civil penalties were assessed for noncompliance with the drug and alcohol testing regulations. (Tr. 161.)

Pinnacle's counsel admitted during opening argument at the hearing that there were prior violations. (Tr. 78.) However, on appeal, Pinnacle argues that Complainant's proof of prior violations was inadequate. According to Pinnacle, Complainant should have provided the actual orders assessing civil penalty because the summaries contained abbreviated language and limited information.

Pinnacle failed to make this objection at the hearing and to preserve this argument for appeal. In any event, any abbreviations were explained (Tr. 165) and there *was* sufficient information – disposition, amount, types of violations, year. There was no need to know specifically what happened to cause these pre-employment violations or the exact number of violations in each civil penalty case.

Pinnacle also argues that the report summaries may have actually reflected compromise orders with findings of no violations under 14 C.F.R. § 13.16(n)(1) (2007). However, nothing in the report so indicates. It was up to Pinnacle to bring out, if it could, findings of no violations, for example on cross-examination of Complainant's witness. Pinnacle failed to rebut the evidence offered at the hearing.

Although Pinnacle argues that it had no opportunity to review the report summaries before the hearing, it apparently failed to ask Complainant for any reports of prior violations. (Tr. 156.) As the ALJ said, Pinnacle's counsel should have known – if he had read the statute and the criteria that Complainant must follow in determining the civil penalty amounts – that Pinnacle's prior history was going to be an issue in this matter. (Tr. 158.)

Conclusion

As discussed above, Pinnacle's argument regarding the ALJ's finding of a violation involving its failure to conduct pre-employment testing of Stewart and to receive negative drug test results prior to hiring him is rejected. While there was evidence that Sampson was not included in the pool for random alcohol testing, Complainant failed to allege a violation of 14 C.F.R. § 121.459, and, consequently, it failed to allege a regulatory violation. Hence, as the ALJ held, a total of 19 violations were proven in this case.

Pinnacle argued for a reduction of the $200,000 civil penalty. As discussed above, the

FAA had the authority to assess a civil penalty not exceeding $25,000 per violation. Hence, for 19 violations, a maximum civil penalty of $475,000 could have been assessed. The $200,000 civil penalty imposed by the ALJ is less than half of $475,000.

Drug and alcohol testing violations put lives in danger and thus warrant significant civil penalties. When the tests do not occur as they ought, employees in safety-sensitive positions and potential employees for these positions who would have tested positive for drugs or alcohol or both are not detected.[20] Pinnacle's argument regarding mitigating factors, as discussed, is rejected.

Turning now to aggravating factors, a respondent's history of prior violations is an aggravating factor. The FAA's Enforcement Sanction Guidance Table that was in effect at the time, FAA Order No. 2150.3A, Appendix 4, stated, "Alleged violations will fall within the normal range only when the violator has no prior violations." As discussed above, Pinnacle had five prior violations.

Further, the existence of systemic violations is another aggravating factor. Here, we do not have an isolated, single violation. Instead, 19 separate violations took place, and as the ALJ pointed out, Pinnacle's failure to bring its drug testing program into compliance with the regulations in this case lasted nearly a year. (Initial Decision at 9.)[21]

[20] Drug and alcohol testing has been proven to be an effective detection tool. Aviation employers have reported to the FAA large numbers of positive tests. 69 Fed. Reg. 1840, 1840 (January 12, 2004).

[21] This decision will be considered an order assessing civil penalty unless Pinnacle files a petition for review within 60 days of service of this decision with the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. Court of Appeals for the circuit in which Pinnacle resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2011). *See* 71 Fed. Reg. 70465 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

In the absence of any mitigating factors, and in the presence of certain aggravating factors, the civil penalty assessed by the ALJ of $200,000 is affirmed.

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